SUNGEI WAY LEASING SDN. BHD. & ORS.

v.

BANK BUMIPUTRA (M) BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[CIVIL SUIT NO. C3889 OF 1986]
5 MARCH 1988

LAND LAW : *Recovery of equipment - Air conditioning unit fixed to building - Removal of equipment would damage building - Express agreement that owner of building had no right of title - Owner of equipment was entitled to compensation from chargee - Chargee had intervened.*

The plaintiffs made an application for summary judgment for delivery of a central air-conditioning unit which they had installed in the first defendant's premises, which was a commercial complex. The said equipment was leased by the plaintiffs to the first defendant. It was provided in the lease agreement that the said equipment would remain the property of the plaintiff. The first defendant was required to obtain the acknowledgment of the interveners who were the chargees of the said land on which the premises was erected that the said equipment would remain the property of the plaintiff. It was contended that the equipment could not be repossessed as it had been built into the building structure and the building would be damaged if the equipment was removed.

Held:

[1] It was expressly agreed by the first defendant that the ownership of the equipment could remain with the plaintiff although it was attached to the land.

[2] As a chargee, the only equity which the intervener had was that the removal of the equipment would damage the building and make the premises useless. The plaintiff was entitled to judgment against the interveners for the market value of the equipment as on the date the application to intervene was made and interest at 8% per annum from that date until realisation. The plaintiff was entitled to such compensation under s. 28(2), Civil Law Act 1956 (Revised 1971) as they had made a *bona fide* improvement to the land with the belief that they were entitled to ownership of the equipment.

[3] The chargee was entitled to recover the amount paid to the plaintiff from the proceeds of the sale of the land in the event of a foreclosure and sale. In the event that the proceeds of sale were insufficient, the sum could be recovered by the chargee/intervener from the first defendant.

[Judgment to the plaintiff. Costs to be paid by the intervener.]

Cases referred to:

Wiggins Teape (M) Sdn. Bhd. v. Bahagia Trading Sdn. Bhd.; the East Asiatic company Ltd. & Ors. as objectors [1980] 2 MLJ 45
Khoo Hock Leong v. Lim Ang Kee [1888] 4 KY 353
Kassim bin Arippin v. Mohamed bin Ramlan [1971] 1 MLJ 87
Wee Kang Whye and Anor. v. Lee Woon Tong [1974] 1 MLJ 7
Mok Deng Chee v. Yap See Hoi & Ors. [1981] CLJ (Rep) 69

Legislation referred to:
Civil Law Act 1956, s. 28(2)
National Land Code 1965, s. 243
Rules of the High Court 1980, O. 2 r. 2

For the plaintiffs - Lee Min Choon; M/s. Lee Min Choon & Co.
For the defendants - Yeow, (Johanan Puthucheary with him) M/s. Wang Kuo Shng & Co.
For the interveners - Vijaya Kumar; M/s. Albar Zulkifly & Yap

JUDGMENT

Mahadev Shankar J:
(On encl. 14)

Along Jalan Bukit Bintang Kuala Lumpur is a well-known commercial/residential complex described as KL Plaza. This complex is built on a block of land which is made up of the land comprised in the documents of title CT No. 17922 up to CT 17960 (inclusive) and CT No. 13554 up to CT 13557 (inclusive). This land belonged to Lian Seng Properties Sendirian Berhad (Lian Seng) the 1st defendant herein. To finance the development Lian Seng borrowed RM52 million from Bank Bumiputra Malaysia Berhad and Bumiputra Merchant Bankers Berhad (the bankers). RM25 million of the loan was secured by two charges under the National Land Code both dated 14 May 1980. These two charges were in favour of Bank Bumiputra Malaysia Berhad. A further charge was executed over the land aforesaid on 6 June 1983 for RM37 million in favour of Bumiputra Merchant Bankers Berhad. The bankers therefore financed the entire building of the complex.

Central air-conditioning is an integral facility of this kind of complex. Just after mid 1985 four units of centrifugal liquid chillers together with condenser water pumpsets, cooling towers and condenser water pumpsets, air-handling units and a variety of ancillary equipment including air-conditioning switch boards, pipes, ducts work etc. were installed in the complex. I refer hereafter to all these equipments collectively as the air-conditioning equipment. This air-conditioning equipment costs about RM2.28 million. It was the subject of a written lease agreement between Lian Seng and the plaintiffs. The 2nd, 3rd and 4th defendants were guarantors under the agreement but the issue of their liability does not concern us in this judgment.

The character of the equipment however is very material because the crux of the dispute with which this judgment is concerned relates to the issue as to whether the equipment was the kind of fixture which became a part of the land by virtue of its being affixed thereto.

Article 10 of the lease agreement provided as follows:

> **Article 10.** (Equipment not to be affixed to premises)
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> (1) Without the lessor's written consent the lessee shall not affix secure, fasten, anchor or in any way attach the equipment to the premises in which the equipment is kept and used or to any immovable property.
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> (2) If the equipment shall be affixed, attached or secured to the land or premises of which the lessee is owner or has an estate or interest other than as lessee the equipment shall be deemed not to be fixtures and may be removed by the lessor at any time in accordance with the provisions hereof and the lessor shall be entitled to enter upon such land or premises at any time for such purpose and shall not be liable in respect of loss damage or otherwise arising in respect of such entry or such removal.

(3) In the event that the lessee seeks the lessor's consent referred to in the preceedings paragraph of this Article, the lessee shall submit a written consent or a certificate from the owner or landlord of such premises or immovable property to the effect that such owner or landlord agrees not to treat the equipment as a fixture or fitting forming a part of such premises or immovable property and that the lessor shall have the same rights of entry and removal as in sub-clause (2) hereof set forth and as between the lessor and the lessee the equipment hereby leased shall remain personal property and shall continue in the ownership of the lessor notwithstanding that the same may have been affixed to any land or building as aforesaid. The lessee shall be responsible for any damage caused to any such land or building by the affixing of the equipment thereto or the removal of the equipment therefrom (whether such affixing or removal be effected by the lessor or the lessee) and shall indemnify the lessor against any claim made in respect of such damage.

(4) If such land or premises is or becomes the subject of a charge the lessee without any request required from the lessor will obtain the written acknowledgement of the chargee that the equipment do not form part of the fixtures to the land or premises the subject of such charge and that the chargee will not make any claim in relation thereto and will permit the lessor whether or not there has been any default under the charge, to enter upon such land or premises and to remove the equipment therefrom.

(5) The lessee hereby undertakes to the lessor that it will duly and punctually pay all rents, assessed taxes and other outgoings payable in respect of the premises where the equipment may for the time being be placed, stored and/or used and shall produce to the lessor on demand the receipt or receipts for the then latest payment due in respect thereof.

Article 11. (Prohibition of Transfer etc., of equipment)

(1) The lessee acknowledges that ownership and title to the equipment after delivery thereof to the lessee shall remain vested in the lessor and the lessee shall have no right or interest therein otherwise than as a lessee or bailee. The lessee shall not attempt to transfer sell or otherwise dispose of the equipment or do any other act that may infringe upon the lessor's ownership. The lessee shall not permit the equipment to be possessed or used by any third party. If such event occurs, the lessee shall immediately notify the lessor thereof and the lessee shall at its own cost and expense forthwith cause the equipment to be released therefrom.

(2) If the lessor's title to the equipment is impeached, infringed or jeopardised whilst the equipment is the subject of the lease hereby created (or if thereafter, in consequence of anything done by the lessee) the lessee shall bear all costs and expenses incurred by the lessor in removing such impeachment infringement or jeopardy.

(3) Without prejudice to the generality of the foregoing paragraphs of this Article, the lessee shall not:

(a) sell assign sub-let pledge mortgage charge encumber or part with possession of or otherwise deal with the equipment or any interest therein nor create nor allow to be created any lien on the equipment whether for repairs or otherwise and in the event of any breach of this clause by the lessee the lessor shall be entitled (but shall not be bound) to pay to any third party such sums as is necessary to procure the release of the equipment from any charge encumbrance or lien and shall be entitled to recover such sum from the lessee forthwith;

(b) sell mortgage charge demise sub-let or otherwise dispose of any land or building on or in which the equipment is kept or enter into any contract to do any of the aforesaid things without giving the lessor at least six (6) weeks' prior notice in writing and the lessee shall in any event procure that any such sale mortgage charge demise sub-lease or other disposition as the case may be is made subject to the right of the lessor to repossess the equipment at any time (whether or not the same or any part thereof shall have become affixed to the said land or building) and for that purpose to enter upon such land or building and sever any equipment affixed thereto.

On the date on which the lease agreement was executed the land was the subject of the charges earlier referred in favour of the bankers. Therefore by Article 10(4) Lian Seng was obliged without any request required from the plaintiffs to obtain the written acknowledgement of the bankers that the equipment do not form part of the fixtures to the land or the premises subject to such charges and that the bankers will not make any claim in relation thereto but will permit the plaintiffs to remove the equipment therefrom.

The only other observation that I would make is that by virtue of Article 11 the plaintiffs were clearly to continue to be regarded as the owners of the equipment and Lian Seng could not pass title to the equipment to a third party.

As between the plaintiffs and Lian Seng therefore it was quite clear that the plaintiffs alone were entitled to the equipment.

Subsequently problems arose between the plaintiffs and the defendants in this action. So they filed this writ on 13 December 1986. Thereafter they applied *ex parte* for a mandatory injunction to permit them to remove the equipment. This was resisted by the defendants. One of the oppositions was that the equipment was custom made for Kuala Lumpur Plaza and it could not be removed without causing substantial damage to the building and affecting the operation of the whole of the air-conditioning system for KL Plaza. Furthermore it was contended that the equipment could not be repossessed as these are built into the building structure of Kuala Lumpur Plaza and has become part of the building and any attempt at repossession will cause damage to the buildings. The defendants made a cross application for an injunction to prevent the plaintiffs from interfering with the equipment and the plaintiffs then filed an application for summary judgment in which one of the orders they sought was that Lian Seng should deliver up possession of the equipment.

What then happened was that the bankers applied to intervene in these proceedings and upon being so allowed to claim that they had a prior interest in the equipment.

I allowed the bankers to intervene and issue was then joined between the bankers and the plaintiffs as to how the rights of the respective parties should be dealt with as to the equipment.

Mr. Vijaya Kumar of Counsel for the bankers referred to Teoh Keng Sood - *Land Law in Malaysia* pp. 69 to 71 and the cases therein cited. In considering these authorities, care should, I think be taken, to distinguish between the unconditional attachment of things to land by its owner or third party and the conditional attachment of things to land upon the express understanding as between the owner of the land and the owner of the chattels that they are not to form part of the land. *Wiggins Teape (M) Sdn. Bhd.v. Bahagia Trading Sdn. Bhd.; the East Asiatic Company Ltd & Ors. as objectors* [1980] 2 MLJ 45 was Mr. Kumar's strongest authority and I shall say a little more about that case shortly.

I think it is important to keep in the forefront of our minds that this a case where Lian Seng as owner of the land had agreed in writing with the plaintiffs that ownership in the equipment, although attached to the land, was not to pass but to remain in the plaintiffs. When the land was charged, the equipment was not there. In other words the equipment was not a part of the bankers security. Nevertheless they are claiming that it has become so, even though it was never the intention either of the plaintiffs or for that matter of Lian Seng that it should.

Mr. Lee Min Choon of Counsel submitted that the rights which the bankers acquired under their charges is what was given to them under s. 243 of the National Land Code. Chargees do not acquire ownership or even possession merely by virtue of the execution of the charge.

They have a right of inspection and a right to foreclosure and sale but that is in the event of a default. Mr. Lee submitted that this is a vital difference as between Malaysian and English Land Law because an English mortgage transfers ownership and rights of possession. He further submitted that the impact of this difference in the Malaysian situation was not fully argued before L.C. Vohrah J in the *Wiggins Teape's* case. There the learned Judge was of the view that the Senior Assistant Registrar was right in deciding that the banker-chargee had a prior claim as against East Asiatic company who were the hirers of the machine.

What that decision does not spell out is what happens where chargees as in that case acquire a windfall in the form of the added value of the machinery to their security, for which added value they had given no consideration and which they were never meant to have. Indeed Teoh Keng Sood in his book *Land Law in Malaysia* at p. 71 recognizes this problem. He contrasts s. 35 of the New South Wales Hire Purchase Act - 1960 and the absence of similar provision in our legislation. He appears to suggest that the difficulty can be got over by prior contractual arrangements between the respective parties.

But Mr. Vijaya Kumar of Counsel for the bankers in our case is undeterred. He is insisting upon a prior equity to this equipment and by that he means that the bankers are entitled in all the circumstances to have the equipment sold with the land and to apply the proceeds towards the discharge of that loan.

No further authorities were cited and I must now decide the issue on the basis of material I have had to dredge up on my own.

Section 28(2) of the Civil Law Act 1956 - Revised Act No. 67 of 1972 reads in material particular:

> If any person ... makes an improvement upon any land held by him in the *bona fide* belief that he had an ... absolute estate, and that person ... is evicted from the land by any person having a better title, the person who ... made the improvement ... shall be entitled either to have the value of the ... improvement so ... made while the land was held by him and in that belief estimated and paid or secured to him or at the option of the person causing the eviction to purchase the interest of that person in the land at the value thereof but not taking into account the value of the building or improvement.
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> (3) The amount to be paid or secured in respect of the ... improvement shall be the estimated value of the same at the time of the eviction.

In simple terms this is an equity which gives a person who makes a *bona fide* improvement to land, without intending that it should gratuitously benefit a third party, the right if justice so requires to have the value of that improvement restored to him. The actual shape of the order required in such cases would depend on the circumstances. In biblical terms, Solomon's judgment of cutting the baby in half, is only a notional means to a judicial end.

The principle is therefore as old as the hills. Reference may be made to *Khoo Hock Leong v. Lim Ang Kee* [1888] 4 KY 353, *Kassim bin Arippin v. Mohamed bin Ramlan* [1971] 1 MLJ 87, *Wee Kang Whye and Anor. v. Lee Woon Tong* [1974] 1 MLJ 7 and *Mok Deng Chee v. Yap See Hoi & Ors.* [1981] CLJ (Rep) 69. The last authority is the decision of the Federal Court. In that case a tenant who had built a house on land with approval or at least without the objection of the previous owner was held by virtue of the expenditure involved to be entitled to an equity which was not lost by changes made to the house or changes to the ownership of the land.

I am sure that some industry on the part of Counsel will reveal other decisions by the late H.T. Ong Chief Justice of Malaysia and the present Lord President Tun Salleh Abas in similar cases where the owner of land who stood by while improvements were being made thereupon, was not allowed subsequently to claim the benefit of the improvements thereto without compensating the aggrieved party.

So also in our case I am compelled to hold that the bankers cannot insist, as they are doing, that the plaintiffs must surrender to them the value of their equipment which is in the premises. True the plaintiffs cannot detach the equipment from the premises without causing substantial damage to the structure. But then true also, that the plaintiffs never intended to part gratuitously with this equipment which had caused them a lot of money.

In these circumstances it is my finding that the only equity which the bankers can claim is that the plaintiffs cannot willy-nilly remove the equipment and damage the premises. Indeed the removal of the air-conditioning will make the premises useless.

So my order is that there be judgment for the plaintiffs against the bankers for the market value of the equipment on the date on which the bankers filed their application in this suit to intervene and contest the claim of the plaintiffs. The plaintiffs will also have interest on that value at 8% per annum from the date aforesaid until realisation.

I further order that this value shall be assessed by a quantity surveyor to be appointed by both parties if they can agree to one. Failing that I gave the plaintiffs and the bankers liberty to apply for further directions.

The defendants took no interest in the present issue when it was argued before me. Nevertheless as they are interested in the ultimate value which is assessed I direct that notice of all proceedings between the plaintiffs and the bankers arising out of this order shall be given to the defendants through their solicitors upon record and they shall be at liberty to make such representations as they deemed best advised.

I further order that the bankers shall be entitled to recover the amount paid to the plaintiffs from the proceeds of the sale of the land and building in the event of a foreclosure and sale but in the event that this should prove insufficient then I direct that the bankers do have an order that the said sum be paid by the 1st defendant.

Finally I order that the costs of and arising out of the present application be taxed and paid by the bankers to the plaintiffs.

JUDGMENT NO. 3

[Civil Suit No. C 23-3889-86]
20 September 1988

On 15 March 1988 I had delivered a lengthy judgment in chambers on an issue which concerned the plaintiffs and the interveners. When the judgment was read, Counsel for the interveners was absent.

Section 68(2) of the Courts of Judicature Act 1964 provides in material particular:

> No appeal shall lie from an order made by a Judge of the High Court in chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

Order 56 r. 2(2) of the Rules of the High Court provides:

> (2) Any party dissatisfied with any order made by a Judge in chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order, in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

Appendix B of the Rules of the High Court item 31 provides that the prescribed fee payable, "On adjourning from chambers into Court any other summons or matter" is RM20 payable on a praecipe.

Since the judgment given arose out of a summons-in-chambers it would appear that in the event of dissatisfaction the provisions aforesaid would apply.

By a letter dated 22 June 1988 the intervener's solicitors wrote to the Judge's Secretary referring to a letter which they alleged they had written to her on 15 March 1988 in which they apologised for their absence during the reading of the judgment and requested for a further argument in Open Court or alternatively the Judge's certificate that no further argument was required. A photocopy of their file copy of this letter was attached. It purports to bear the rubber stamp of the Judge's Secretary and an illegible signature.

There is no trace whatsoever of the original of this letter. The illegible signature acknowledging the letter is not that of the Judge's Secretary. It appears to be similar to the signature of the Court Orderly. The original letter was never sighted by the Judge.

Consequently no action was taken. So by a summons-in-chambers dated the 5 September 1988, the interveners solicitors formally applied for an order in the circumstances that should be added time limited for notice in writing to the Registrar for the further arguments be extended to the date of hearing and disposal of this application or alternatively that the interveners letter of the 15 March 1988 addressed to the Judge's Secretary be deemed an irregularity and be treated as a good application.

But the letter had not been written to the Registrar as required by the rules, the praecipe fee had not been paid on time, and the Court Orderly was certainly not person who was authorised either to receive documents or to help himself to the Secretary's rubber stamp and sign on her behalf.

Mercifully however the plaintiffs' solicitor did not seek to make anything of these lapses but left the matter to the Court. The interveners' solicitor took full responsibility but averred of his own knowledge that the letter had in fact been signed and sent in by him through his despatch clerk on the basis of urgency. He prayed the aid of the Court under O. 2 r. 2 of the Rules of the High Court and Article 8 of the Schedule to the Courts of Judicature Act 1964.

In all the circumstances I ordered that it be deemed that the interveners had given the requisite notice of their application and certified that I needed no further argument.

The costs of this application should rightly be taxed and paid by the interveners to the applicant and I so order.

Also found at [1989] 1 CLJ 996